

Opinion No. 58-39

February 20, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Howard M. Rosenthal,
Assistant Attorney General

TO: Mr. R. C. Morgan, State Senator, Roosevelt County, Portales, New Mexico

QUESTION

QUESTIONS

1. Is a professor teaching in one of our universities eligible to run for the legislature?
2. Is a retired person (under the old teacher retirement law) eligible to run for the state legislature? (retired from a university)

CONCLUSIONS

1. Yes.
2. Yes.

OPINION

ANALYSIS

Article IV, § 3 of the New Mexico Constitution, in part, provides:

". . . No person shall be eligible to the legislature who, at the time of qualifying, holds any office of trust or profit under the state, county or national government, . . ."

Article IV, § 28 of the New Mexico Constitution, in part, reads:

"No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, . . ."

The question that seems to be involved is whether a professorship in one of our universities or a person retired in an emeritus status from one of our universities occupies in either case such an "office of trust or profit" or a "civil office" as would make acceptance of compensation illegal or the holding of such position unconstitutional.

There are several tests for determining whether a position is or is not a civil office. We will use the test first stated in *State v. Quinn*, 35 N.M. 62, and reiterated in *State ex rel.*

Gibson v. Fernandez, 40 N.M. 288. an abbreviation of which is found in 93 A.L.R. 333, as follows:

". . . when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which are also continuing in their nature and not occasional or intermittent . . ."

We are of the opinion that a teaching professor in one of our universities does not exercise any portion of sovereign power and is not a post created by law. While it may be said that a retired person holding emeritus status is occupying a position created by law (we do not agree with this position but do not believe it necessary to pass upon the same in this opinion) no portion of the sovereign power is exercised and we do not believe that such a status is that of a civil officer.

Hence we are of the opinion that both questions should be answered in the affirmative.

There are several statutory references that do not necessarily pertain to your questions but which we believe should be included in this opinion in order that the individuals involved might not find themselves placed in an embarrassing position in the event of a successful run for office. These statutory references concern the compensation of the individual and not his eligibility for the office in question.

Section 5-3-40, in part, provides:

". . . and who by reason of such other public office or employment or private employment shall fail for a period of thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment, shall be deemed to have resigned from and to have permanently abandoned his public office and employment."

We believe this language is sufficiently clear and explicit to require little explanation.

Section 2-1-4, in part, reads:

". . . it shall be unlawful for any member of the legislature, during the term for which he is elected to contract for or receive any compensation for services performed as an officer or employee of the state, except such compensation and expense money as he is entitled to receive as a member of the legislature."

Section 2-1-5, in part, provides:

". . . it shall be unlawful for any officer of the state of New Mexico to pay to any member of the legislature compensation for services rendered the state of New Mexico as an officer or employee thereof during the term for which such legislator was elected except

such compensation and expense money which such member is entitled to receive as a member of the legislature."

While this office is satisfied that a professor is not to be considered an officer of the State of New Mexico, it is by no means as clear that he is not to be considered an employee thereof. This office has held that school teachers are outside the contemplation of this statute (§ 2-1-4) in Attorney General Opinions No. 4645 and 57-11, but neither of these opinions include professorships at the State University nor did the reasoning contained therein indicate that professorship at the State University are not state employees. Also, in *State v. Regents of University of New Mexico*, 32 N.M. 428, there is language that might indicate that our Supreme Court is of the opinion that university faculty members draw salaries from the university and not from the State.

Despite this, by virtue of the legislative appropriation of several millions of dollars annually to the university out of State funds, this office is of the opinion that employment by the State is a necessary implication. Hence, although not made a part of this opinion, this office is extremely dubious as to the legality of compensation paid a professor at the university while he is receiving compensation and expenses as a member of the Legislature, or during the term for which he was so elected.

In summary, and to make clear the position of this office, we do not doubt the eligibility to serve in the Legislature in the two instances covered by your questions, but we do wish to draw to your attention the distinct possibility that legal compensation for the university professor is problematical.